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ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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August 10, 2000

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BY FACSIMILE

The Honorable Alexis M. Herman
Secretary
Department of Labor
200 Constitution Avenue, N.W. - Room S2018
Washington, D.C. 20210

Dear Madam Secretary:

This letter follows up on six letters from me to Department of Labor (DOL) Solicitor Henry Solano, Occupational Health and Safety Administration (OSHA) Assistant Secretary Charles Jeffress, and you, from December 3, 1999 through July 5, 2000, which questioned possible augmentation of DOL full-time equivalents (FTEs) by use of contractors, DOL's improper use of contractors for inherently governmental functions in the rulemaking process, and DOL's use of contractors to unfairly bias its ergonomics rulemaking. On May 31st, I requested a legal opinion from the Department of Justice about possible defects in DOL's ergonomics rulemaking.

I request that you respond to the questions in the enclosure, including, at DOL's request, questions intended for two DOL employees who were formerly DOL contractors. Please deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, September 1, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058. Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Enclosure

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich
The Honorable Anne Northup

The Honorable Mike Enzi
Randolph Moss, Esq., DOJ
David Ogden, Esq., DOJ

Questions for DOL on Ergonomics Contractors

Q1. Contract Expenses. On May 10, 2000, the Subcommittee requested information about all Department of Labor (DOL) contract awards for its ergonomics rulemaking. On May 26th, DOL provided a listing of contract awards from 1996 to present. In response to the Subcommittee's further inquiry on June 12th and its chart indicating possible additional contracts based on a DOL response to a Freedom of Information Act (FOIA) request by a private party to DOL, on June 30th, DOL provided some clarifications. On July 21st, DOL provided some additional "pre-1995" awards information.

a. Were there any contract awards for the ergonomics rulemaking in 1996 or was the "pre-1995" date a typographical error, i.e., did DOL intend to say "pre-1996"?

b. Since the National Archives and Records Administration (NARA), in its "Baseline Services" document, currently commits to produce all Clinton Administration agency records within 24 hours, on what date(s) did DOL request archived information on pre-1996 awards and on what date(s) did DOL receive archived information?

c. Please explain the reason(s) for DOL's delay in fully responding to the Subcommittee's May 10th request.

d. When will DOL provide the remaining requested (three months ago) information about its contract awards for the ergonomics rulemaking, including any DOL contract awards since the Subcommittee's May 10th request?

Q2. Augmenting FTEs. Please complete the following chart, including DOL's actual (vs authorized) full-time-equivalent (FTE) staffing by year for all of OSHA's rulemaking activities from 1992 to present and separately for its ergonomics rulemaking, and DOL's contract expenses by year for all of OSHA's rulemaking activities from 1992 to present and separately for its ergonomics rulemaking.

Year	FTEs for all OSHA rulemakings	FTEs for ergonomics rulemaking	Contract \$ for all OSHA rulemakings	Contract \$ for ergonomics rulemaking
1992				
1993				
1994				
1995				
1996				
1997				

Year	FTEs for all OSHA rulemakings	FTEs for ergonomics rulemaking	Contract \$ for all OSHA rulemakings	Contract \$ for ergonomics rulemaking
1998				
1999				
2000				

Q3. Darius Sivin. From January 20, 1999 to June 30th, Darius Sivin performed DOL services as a subcontractor. On July 16th, DOL awarded him a contract for services from July 1st (i.e., prior to the contract award) to August 31st. On September 22th, he became a DOL employee.

a. Since the DOL contract was not awarded until July 16th, under what authority, if any, did DOL reimburse Mr. Sivin for services rendered by him from July 1st to July 15th?

b. Did any DOL employee discuss with Darius Sivin how to respond to the Subcommittee's June 1, 2000 and July 5th letters? If so, what advice did the DOL employee(s) give Mr. Sivin? Also, please identify such employee(s).

c. In a telephone conversation on June 15th, Mr. Sivin agreed to provide e-mails both authored by him and received by him. Which DOL employee(s) coached Mr. Sivin after June 15th to originally only provide e-mails and other documents authored by him and not those he received?

d. In a telephone conversation on July 26th, Mr. Sivin volunteered his awareness of the Subcommittee's interest in obtaining answers to the questions he neglected to answer in his July 17th reply to the Subcommittee's July 5th letter. Which DOL employee(s) told Mr. Sivin before July 26th about the Subcommittee's interest in obtaining missing answers, including the amount Mr. Sivin was paid as a subcontractor?

Q4. Inherently Governmental Functions.

a. Under Office of Management and Budget (OMB) Circular A-76 and other related government-wide restrictions on procurement, where does DOL draw the line between allowable and unallowable contracting activities for regulatory policy development?

b. What does DOL consider unallowable and, thus, inherently governmental functions for regulatory policy development?

Q5. Targeted Outreach. Documents (e.g., a December 1999 "Dear Stakeholder" letter from OSHA Administrator Jeffress) submitted by DOL's contracted "expert" witnesses reflect

DOL's attempt to influence the record in support of OSHA's November 23rd proposed ergonomics program standard. Please complete the following chart, including an identification of each person or entity sent a Dear Stakeholder letter, with an indication if each submitted a written comment and/or testified orally and if the comment was in support or opposed to the standard.

Person, Title & Organizational Affiliation	Written Comment (yes or no)	Oral Testimony (yes or no)	Support or Oppose?
[name, title, organization #1]			
[name, title, organization #2]			
[name, title, organization #3]			
...			

- Q6. DOL Editing. Documents submitted by DOL's contracted "expert" witnesses reflect DOL's editing of their draft testimony. Please submit copies of all drafts with any DOL edits on them and all documents (including but not limited to e-mails, memoranda and faxes) with any DOL advice.
- Q7. DOL Coaching. Documents submitted by DOL's contracted "expert" witnesses reflect DOL's rehearsal (practice) sessions. Did any person other than a DOL employee or a contracted "expert" witness attend these sessions? If so, please identify each such person, their organizational affiliation, and which sessions they attended.
- Q8. DOL Advice on McIntosh Requests. DOL staff informed Subcommittee staff that DOL had used a "script" for calls to the "expert" witnesses, asking for their delivery of McIntosh-requested documents to DOL instead of to the Subcommittee. Also, documents (e.g., a June 2000 DOL Solicitor's Office letter to the "expert" witnesses, which was after the Subcommittee's June 23rd deadline for replies) submitted by DOL's contractors reflect DOL advice on how to respond to the Subcommittee's requests.
- Please submit all DOL documents (including but not limited to e-mails, memoranda, and faxes) discussing the McIntosh Subcommittee's requests.
 - Which DOL employee(s) advised "expert" witness contractors not to make timely submissions to the Subcommittee? On which day(s), did DOL provide this advice? Please provide a copy of the "script" used in these calls.

c. Documents (e.g., a July 2000 e-mail from DOL to the “expert” witnesses) submitted by DOL’s contractors reflect DOL’s offer to increase their contract awards. How much will DOL be paying its contractors to respond to the McIntosh requests?

d. Since DOL’s 28 “expert” witness personal service contracts for \$10,000 apiece were awarded without competition, what procurement rules govern amendments to increase the dollar awards for these contracts?

Q9. Conflict-of-Interest. Even though Federal contractors are not subject to the strict conflict-of-interest restrictions applicable to Federal employees, what, if any, checks does DOL make to ensure that its contractors have no conflict-of-interest in the outcome of a rulemaking?

Q10. Marthe Kent. In 1994, Marthe Kent, who is now a DOL official intimately involved in the ergonomics rulemaking, was President and CEO of Meridian Research, Inc., a company which DOL identified on July 21, 2000 as receiving a 1993 contract for the ergonomics rulemaking. In 1995, Meridian sold its assets to the Eastern Research Group (ERG), a company which received at least \$2.5 million in DOL contract awards for the ergonomics rulemaking. According to a September 4, 1995 Washington Times article, “Three days before beginning at OSHA, Ms. Kent disqualified herself from all matters involving Meridian or its successor.”

a. Please provide a copy of each release or any other document that Ms. Kent signed regarding her employment at DOL.

b. Did Ms. Kent review any ERG bids or proposals before DOL awarded contracts for its ergonomics rulemaking? If so, which ones?

c. Please provide a copy of all of Ms. Kent’s ergonomics rulemaking documents (including but not limited to e-mails sent and received and memoranda sent and received) relating to Meridian and/or ERG.

d. The Federal Acquisition Regulation (FAR) generally requires that contract records be retained three years after final payment (48 CFR 4.703). Did Ms. Kent retain any ergonomics documents from her days at Meridian Research? If so, please provide a copy of each record, as defined in the attached. If not, where are these records housed?

Attachment

Definitions and Instructions for the Production of Records

1. When a request calls for the production of records, the Subcommittee requests all responsive records that are in the agency's possession, custody, or control through the date of the final submission of records to the Subcommittee, unless the request clearly states that the Subcommittee is only interested in records received during a particular time period.
2. Please sequentially number all records that you produce to the Subcommittee, and indicate the source of any record if the source is not accurately reflected on the record itself. Please submit all records on single-sided paper and submit an inventory of records produced if the volume is more than 100 pages.
3. To the extent practicable, please organize the records or documents in tabbed binders or folders that indicate which records are responsive to which requests for information.
4. For the purposes of this and related requests in the future, the "record" or "records" shall include any and all drafts, originals, and non-identical copies of any item whether written, typed, printed, electronically recorded, transcribed, punched, or taped, however produced or reproduced, and includes but is not limited to any writing, transcription, or recording, produced or stored in any fashion, including any and all computer entries, memoranda, notes, talking points, letters, journal entries, reports, studies, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, e-mail messages (in hard copy and electronic forms), disks, the text of any alphanumeric messages or other electronic paging devices, briefing materials, cover sheets or routing cover sheets and any other machine readable material of any sort whether prepared by current or former officers and employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include redacted and unredacted versions of the same record.